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In the Supreme Court of the United States

OCTOBER TERM, 1989

GAETANO VASTOLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the government was required to provide a "satisfactory explanation" (18 U.S.C. 2518(8)(a)) for a delay in sealing tape recordings that were produced pursuant to court-authorized electronic surveillance.

2. Whether petitioner's convictions must be reversed because the government released the tape recordings to a private contractor for authentication and electronic enhancement after the court ordered the tape recordings unsealed.

3. Whether inconsistency among the verdicts returned by the jury requires reversal of any of petitioner's convictions.

4. Whether conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1962(d), requires proof that the defendant agreed personally to commit the predicate unlawful act or acts.

5. Whether there was sufficient evidence to show that petitioner conspired to conduct the affairs of a racketeering enterprise through the collection of an unlawful debt.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-75) is reported at 899 F.2d 211. The opinion of the district court (Pet. App. 76-167) is reported at 670 F. Supp. 1244. Subsequent opinions of the district court (Pet. App. 168-176, 177-187) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1990. The petition for a writ of certiorari was filed on April 9, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was found guilty of two substantive offenses under the Racketeer Influenced and Corrupt Organizations Act (RICO) (Counts 1 and 2), in violation of 18 U.S.C. 1962(c); a RICO conspiracy offense (Count 3), in violation of 18 U.S.C. 1962(d); conspiracy to use extortionate means to collect an extension of credit (Count 4), in violation of 18 U.S.C. 894; and conspiracy to obstruct commerce by means of extortion (Count 9), in violation of 18 U.S.C. 1951. The district court granted petitioner's post-conviction motion for a judgment of acquittal on the Count 1 RICO offense. Petitioner was sentenced to a total of 20 years' imprisonment and a $70,000 fine. Pet. App. 4.[1] The court of appeals reinstated the Count 1 RICO conviction, reversed petitioner's conviction on the Count 2 RICO offense, and affirmed the other convictions. The court then remanded the case for resentencing and entry of a corrected judgment.

1. The relevant facts are stated in the court of appeals' opinion. Pet. App. 4-16. Petitioner was indicted with 19 other defendants in a 114-count indictment charging a variety of crimes. After the district court ordered a separate trial for petitioner Vastola and co-defendant Elias Saka, they were tried together on a 26-count superseding indictment that named petitioner in 14 counts and Saka in 25.

The indictment charged petitioner and Saka, his principal lieutenant, with operating a RICO enterprise through the commission of various crimes (including a conspiracy to use and the use of extortionate means to collect an extension

[1] Co-defendant Elias Saka was found guilty of the five offenses of which petitioner was convicted, as well as various other extortion and fraud offenses. He was sentenced to a total of 20 years' imprisonment and a $185,000 fine.

of credit), numerous usurious loans, schemes to defraud suppliers of businesses controlled by the enterprise, and insurance and bankruptcy frauds. Two of those schemes are relevant to the five counts on which the jury convicted petitioner. Pet. App. 6.

One scheme involved a usurious loan to Joseph Dwek, who arranged to borrow $15,000 from Saka, with interest payable at a rate of $250 per week. Dwek fell behind on his payments, and on May 7, 1985, Saka threatened to strangle Dwek if he did not pay what he owed. The evidence showed that petitioner was aware of the loan to Dwek and advised Saka in his efforts to collect the debt. Pet. App. 7-10.

The second scheme relevant to petitioner's convictions involved the purchase of a large quantity of records and tapes by Salvatore Pisello. The sale price, approximately $1.75 million, was guaranteed by a company owned by Morris Levy, one of petitioner's co-conspirators. Pisello and Levy asked petitioner to find a buyer for the records and tapes, and he recommended John LaMonte, who owned a record distribution company. A sale to LaMonte was made in the summer of 1984, and the goods were delivered to him. LaMonte agreed to pay $2.05 million for the merchandise; the $300,000 profit was to be split among petitioner, Pisello, and Levy. Problems arose when LaMonte failed to complete payment on the sale. Levy urged petitioner to cause LaMonte to pay the amounts due. Petitioner's efforts in that regard were reflected in his January 1985 statement to a confederate that, if LaMonte failed to cooperate, he would put him in the hospital. In fact, during a May 1985 meeting to discuss the debt, petitioner hit LaMonte in the face, causing him to be hospitalized for at least four days. The efforts to induce LaMonte to pay the debt continued until October 1985. Pet. App. 10-16.

2. The government's evidence at trial consisted primarily of tape recordings that were the products of court-authorized and consensual electronic surveillance. The recordings captured conversations among the conspirators between late 1984 and October 1985 and conversations that LaMonte had with the conspirators between May and September 1985.

The electronic surveillance of Vastola's warehouse, the headquarters of the RICO enterprise, ended on March 25, 1985. Although Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2518(8)(a), requires recordings of intercepted conversations to be sealed "[i]mmediately upon the expiration of the [intercept] order," the tapes were not sealed until July 15, 1985. Pet. App. 63 & n.33.

After the tapes were sealed, the government moved to unseal a number of them temporarily prior to trial. In response, the courts with jurisdiction to do so ordered a number of the tapes unsealed to facilitate trial preparation. The government then sent a set of the unsealed tapes to Paul Ginsberg, an expert in tape recording technology whom the government had employed to "filter" them, *i.e.*, to make copies with the extraneous noises removed. The government retained an identical set of original tapes when it sent one set to Ginsberg for filtering. Ginsberg kept the tapes for approximately 35 days. In addition to filtering the tapes, he tested them to determine whether they had been tampered with in any way and determined that they had not. The evidence showed that Ginsberg took appropriate precautions to ensure that the tapes were not tampered with while they were in his custody, and there was no evidence that the original tapes had been altered in any manner. Pet. App. 63-65.

The district court rejected petitioner's motions to suppress the tape recordings because of the delay in sealing and

because of the transfer of custody to Ginsberg. Relying on *United States* v. *Falcone*, 505 F.2d 478, 484 (3d Cir. 1974), the court held that suppression was not required so long as the integrity of the tape recordings was established. The court accordingly did not require the government to explain the reason for the delay, nor did the court find any reason to suppress the conversations because a set of original tapes was transferred to Ginsberg after they were ordered unsealed. Pet. App. 158-159, 172-176.

3. The jury returned inconsistent verdicts. Count 1 of the superseding indictment charged petitioner with conducting an enterprise through a pattern of racketeering activity and alleged four predicate acts, each of which was defined by reference to other counts of the indictment. The first predicate act alleged against petitioner was his participation in the conspiracy to use extortionate means to collect LaMonte's debt. The portion of the RICO count that charged that predicate act referred to acts that were separately charged in Counts 4, 5, 9, and 10. The second predicate act was petitioner's participation in a conspiracy to make usurious loans and to use extortionate means to collect them, as separately charged in Counts 6 and 7. The third predicate act was an extortionate loan to Daniel Zack, as separately charged in Count 11. The fourth predicate act was petitioner's fraudulent transfer of property in violation of the bankruptcy laws, as separately charged in Counts 24 and 26.

The jury convicted petitioner of the Count 1 RICO offense, but it returned a verdict of acquittal or deadlocked on each of the substantive offenses that were cross-referenced as the second, third, and fourth predicate acts. The jury convicted petitioner of the offenses charged in Counts 4 and 9, but those offenses both came within the scope of the first predicate act alleged in Count 1. Pet. App. 22-24.

The RICO substantive offense charged in Count 1 required proof that petitioner committed two of the alleged predicate acts. The district court reasoned that the jury had convicted petitioner of offenses comprising one predicate act only; the court therefore granted petitioner's post-conviction motion to set aside the guilty verdict on Count 1 as legally insufficient. Pet. App. 178-181.

4. On the government's appeal, the court of appeals reinstated petitioner's conviction on Count 1 subject to further proceedings on remand. Pet. App. 22-32. The court found that the jury had been properly instructed on the elements required for a conviction on the RICO count, and that even if the verdict on Count 1 was inconsistent with the verdicts on the related counts that charged the predicate acts, that would not justify vacating the conviction on Count 1. The court of appeals left for determination on remand the question whether the evidence was sufficient to support petitioner's conviction on Count 1.

The reinstatement of the guilty verdict on Count 1 resolved the government's appeal. Petitioner took a separate appeal on the counts on which he had been convicted. The court of appeals held that the evidence was sufficient to support the convictions on Counts 4 and 9. Pet. App. 42. The court, however, reversed petitioner's conviction on Count 2, which charged that petitioner had participated in a RICO enterprise through the collection of an unlawful debt. Pet. App. 32-37. The jury had indicated in a special interrogatory that it based its conviction on Count 2 solely on the conclusion that petitioner participated in the unlawful debt collection from Joseph Dwek. While the statute provides that the offense charged, 18 U.S.C. 1962(b), may be committed by a defendant operating a RICO enterprise through the collection of a single unlawful debt, the court of appeals found the evidence insufficient to show that petitioner

had personally participated in the collection of the Dwek debt, as alleged in the indictment.

On the other hand, the court of appeals found the evidence sufficient to uphold petitioner's conviction on the Count 3 RICO conspiracy charge, which alleged that petitioner had conspired to participate in a RICO enterprise through a pattern of racketeering activity, as defined in Count 1, and through use of extortion in the collection of various debts enumerated in Count 2. Pet. App. 37-42. The jury indicated in a special interrogatory on Count 3 that it had based its verdict on both a pattern of racketeering activity and the collection of an unlawful debt. The court of appeals reasoned that it could extrapolate from the jury's special interrogatory on Count 2 that the unlawful debt that supported the Count 3 RICO conspiracy conviction was the Dwek debt. To conclude otherwise would be to assume an inconsistent verdict when there was a reasonable assessment of the jury's action that would yield a fully consistent verdict.

The court of appeals held that the evidence was sufficient to show that petitioner had conspired to operate the enterprise through the collection of the Dwek debt, even though the evidence was insufficient to prove that he had personally participated in the collection of that debt. The court held that the agreement alone, without petitioner's personal participation in the collection of the debt, was sufficient to support the RICO conspiracy conviction. Because the court sustained the RICO conspiracy conviction on the basis of the unlawful debt, it did not consider the sufficiency of the evidence to support the RICO conspiracy conviction on the basis of a pattern of racketeering activity.[2]

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[2] The court of appeals also affirmed the district court's ruling admitting the tapes despite the sealing delay and the temporary transfer of custody to an outside expert. In accordance with circuit precedent,

DISCUSSION

This case should be remanded for reconsideration in light of *United States* v. *Rios*, No. 89-61 (Apr. 30, 1990), which rejects the analysis of the sealing requirement used by the courts below. The remaining issues raised in the petition do not merit review by this Court.

1. There was a delay of more than three months in sealing the tape recordings after the termination of electronic surveillance at petitioner's warehouse. Although the government did not explain the reason for the delay, the tapes were admitted at trial because they were shown to be in their original, unaltered form. In *Rios*, however, this Court concluded (slip op. 7) that "the 'satisfactory explanation' language in § 2518(8)(a) must be understood to require that the Government explain not only why a delay occurred but also why it is excusable." Because the court of appeals held that the unchallenged integrity of the tape recordings established their admissibility, the petition should be granted, the judgment of the court of appeals vacated, and the case remanded for reconsideration in light of *Rios*.[3]

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the court of appeals found that the district court's unchallenged finding regarding the integrity of the tapes was dispositive. Pet. App. 62-73.

[3] Both the district court and the court of appeals denied the motion to suppress solely on the basis of the tapes' integrity; there has thus not yet been any inquiry into the reason for the delay. The court of appeals accordingly may wish to remand the case to the district court for a hearing at which the government can explain the reason for the delay; the district court can then determine whether that explanation is "satisfactory." In *Rios*, respondents contended that the explanation for the delay offered on appeal was a *post hoc* rationalization, rather than the real reason for the delay. The Court accordingly remanded for a determination whether the record showed that the "satisfactory explanation" for the delay presented by the government on appeal was the same as the explanation provided to the district court by the individual responsible for the delay. Slip op. 8-9. Nothing in *Rios* bars

2. Petitioner also contends (Pet. 11) that the tape recordings should not have been admitted, because the government provided a set of the original tapes to a private individual for 35 days for authentication and filtering.

Petitioner acknowledges (Pet. 11) that this issue must be resolved separately from the sealing delay issue. Unlike the delay in sealing, the consequences of an unauthorized transfer of custody to a third party is not governed by 18 U.S.C. 2518(8)(a) or any other provision of the federal wiretap statute. Section 2518(8)(a), by its terms, applies only to procedures for recording and sealing; it says nothing about the handling of the tapes after they are unsealed. The statutory analysis of the Court in *Rios* is therefore inapplicable to the question whether the tape recordings should be suppressed because they were provided to a private party without court authorization after the courts ordered them unsealed.

Because the wiretap statute does not speak to that issue, it is properly viewed as an evidentiary matter governed by the Federal Rules of Evidence. In light of the evidence before the district court it is clear that the tapes were properly admitted under governing evidentiary principles. As the court of appeals noted (Pet. App. 72), "compelling" evidence established that the tapes in this case were unaltered. The district court and the court of appeals were therefore correct in finding the tapes to be authentic and thus not to be subject to exclusion at trial. See Fed. R. Evid. 901.

There is no reason to accept petitioner's unsupported assertion (Pet. 11) that suppression should be ordered in this case because it is difficult to determine whether tapes

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the government from presenting on remand the explanation for the delay in this case. The district court must, of course, find that the explanation given is the actual reason for the delay, not simply a *post hoc* rationalization.

have been tampered with. As the court of appeals noted (Pet. App. 72-73), the uncontroverted evidence before the district court was that tampering can be detected by competent experts in the field of electronic enhancement, and the defendants did not seriously contend in the courts below that the tapes were subject to tampering.

Petitioner cites no authority to support his claim that release of unsealed electronic surveillance recordings to a private party without court authorization or in violation of the terms of an unsealing order require suppression of the evidence. This issue is therefore a very narrow one—and apparently one of first impression—that does not call for this Court's review.

3. Petitioner next contends (Pet. 12) that the inconsistency between the verdict on the Count 1 RICO offense and the verdicts on the substantive offenses that served as the predicate acts for Count 1 require that the conviction on Count 1 be vacated. Petitioner argues (*ibid.*) that this Court's holding in *United States* v. *Powell*, 469 U.S. 57 (1984), that a conviction is not to be vacated merely because it cannot rationally be reconciled with verdicts of acquittal on other charges, does not apply "to the unique circumstances of RICO trials." Petitioner offers no authority for his position; in fact, two other courts of appeals have applied *Powell* in the RICO context. *United States* v. *Tinsley*, 800 F.2d 448, 450-452 (4th Cir. 1986); *United States* v. *Neapolitan*, 791 F.2d 489, 505 (7th Cir.), cert. denied, 479 U.S. 940 (1986). *Powell* itself involved a conviction for compound offenses in which the jury had acquitted the defendant of each of the predicate crimes charged in the indictment. There is no reason for a different rule in the closely analogous context presented in this case, and petitioner does not suggest one.

Petitioner argues (Pet. 12-13) that the analysis of the jury's verdict suggests that it misunderstood its instructions and

erroneously believed that petitioner's guilt of the offenses alleged in Counts 4 and 9—the two offenses of which he was separately convicted—was sufficient to support the RICO conviction on Count 1. But to attempt to divine what the jury thought it was doing is to disregard the central principle of *Powell*: that there are many reasons why a jury may elect not to convict on a particular count even though there is sufficient evidence to support a conviction. *Powell* teaches that if there is sufficient evidence of guilt on challenged counts so that verdicts of conviction can stand on their own, a court may not attempt to discern the jury's reasons for acquittals on other counts and apply those reasons to conclude that a verdict of conviction on some counts should be vacated because it is inconsistent with the acquittals on other counts.

4. Petitioner asks this Court (Pet. 13-14) to resolve a conflict in the circuits over whether a conviction under the RICO conspiracy provision, 18 U.S.C. 1962(d), requires that the defendant participate personally in the predicate acts alleged, or whether it is enough to show that the defendant has entered into an agreement to operate the RICO enterprise by means of those predicate acts. Petitioner further argues (Pet. 14-15) that the evidence could not have been sufficient to support the Count 3 RICO conspiracy conviction based on the collection of an unlawful debt if the evidence was insufficient to support the Count 2 substantive RICO violation grounded on the collection of that same debt. Finally, petitioner argues (Pet. 16) that the court of appeals should not have relied on the jury's special interrogatory response respecting the Count 2 RICO conviction to construe the jury's Count 3 RICO conspiracy verdict. None of these related claims is ripe for decision at this time and, in any event, they are without merit.

The court of appeals did not pass on the question whether the evidence that petitioner committed a pattern of

racketeering acts was sufficient to support the reinstated Count 1 RICO conviction. That issue will be addressed by the district court if it is raised by petitioner after the guilty verdict on Count 1 is reinstated following remand. If the district court concludes that the evidence is sufficient to support petitioner's conviction on Count 1, that will provide an independent ground to support the Count 3 RICO conspiracy conviction, because the jury indicated in a special interrogatory that it had based the RICO conspiracy conviction both on the pattern of racketeering activities alleged in Count 1 and on the collection of an unlawful debt alleged in Count 2. Thus, the issues petitioner raises relating to the court of appeals' ruling on the Count 3 RICO conspiracy conviction are not yet ripe for review. After further proceedings on remand, those issues may become inconsequential to the resolution of petitioner's challenge to his conviction on Count 3.

In any event, petitioner's construction of the RICO conspiracy offense and its application to the facts of this case lack merit. The crime of conspiracy typically requires proof of an agreement whose objective is the commission of one or more unlawful acts. See *Braverman* v. *United States*, 317 U.S. 49, 53 (1942). There is no requirement that each conspirator participate personally in the illegal act or acts that constitute the objectives of the conspiracy. On the contrary, a conspirator may be convicted upon a showing that he agreed to participate in the conspiracy with knowledge of its essential objectives. *E.g.*, *United States* v. *Carter*, 721 F.2d 1514, 1528 n.21 (11th Cir.), cert. denied, 469 U.S. 819 (1984).

In accordance with these basic principles of conspiracy law, the RICO conspiracy statute simply requires that the defendant agree to participate in an enterprise, understanding and agreeing that the enterprise's affairs will be con-

ducted through the commission of a pattern of racketeering activity or through the collection of an unlawful debt. There is no suggestion in the text or the legislative history of the RICO statute that when Congress enacted RICO it intended to depart from the general principles of conspiracy law. Far from imposing the additional restriction on the prosecution that petitioner urges, Congress intended that the RICO statute be liberally construed to achieve its objectives of combatting organized crime. See *Russello* v. *United States*, 464 U.S. 16 (1983); *United States* v. *Turkette*, 452 U.S. 576, 588-589 (1981). The evidence plainly was sufficient in this case to show that petitioner agreed to participate in the operation of his RICO enterprise knowing that one of the methods of its operation was the collection of unlawful debts, specifically the Dwek debt. The court of appeals correctly rejected petitioner's legal and factual arguments to the contrary.

As petitioner points out, two circuits have stated that a RICO defendant must agree to participate in the conduct of the enterprise through his own commission of the required predicate acts. *United States* v. *Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983); *United States* v. *Ruggiero*, 726 F.2d 913, 921 (2d Cir.), cert. denied, 469 U.S. 831 (1984). Those two early decisions, however, have been rejected by every other court of appeals that has subsequently ruled on the issue. See *United States* v. *Adams*, 759 F.2d 1099, 1116 (3d Cir.), cert. denied, 474 U.S. 971 (1985); *United States* v. *Joseph*, 781 F.2d 549, 554 (6th Cir. 1986); *United States* v. *Neapolitan*, 791 F.2d 489, 494-498 (7th Cir.), cert. denied, 479 U.S. 940 (1986); *United States* v. *Leisure*, 844 F.2d 1347, 1367 (8th Cir. 1988), cert. denied, 488 U.S. 932 (1988); *United States* v. *Tille*, 729 F.2d 615, 619 (9th Cir.), cert. denied, 469 U.S. 845 (1984); *United States* v. *Carter*, 721 F.2d 1514, 1529

(11th Cir.), cert. denied, 469 U.S. 819 (1984).[4] Moreover, the decisions in *Winter* and *Ruggiero* do not present an irreconcilable conflict with the decision in this case.

Although *Winter* contains dicta contrary to the ruling in the majority of the circuits, the issue petitioner raises here was not raised in the *Winter* case. The jury in *Winter* was instructed that a conviction would require an agreement to commit the predicate acts personally – an instruction unduly favorable to the defendant. The defendants argued on appeal that a RICO conspiracy requires that each of the defendants actually commit the predicate acts. The First Circuit rejected that argument. The court's statement that a RICO conspiracy requires only an agreement to commit the required predicate acts personally was based on a broad reading of language in an earlier decision from another circuit, which the same court read more narrowly in a later case.[5] The First Circuit's language in *Winter* is therefore dictum, and in light of the discredited underpinnings of that dictum as well as the subsequent contrary decisions of other circuits, the First Circuit may well disavow that position when the occasion arises.

The Second Circuit in *Ruggiero* did reverse a conviction for RICO conspiracy, but the court's analysis of the nature of the RICO conspiracy agreement was not necessary to its decision. The indictment had charged defendant Tomasulo with RICO conspiracy based on two predicate acts. One of the two was held to be legally insufficient on appeal. The court therefore concluded that the single surviving predicate

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[4] The Eleventh Circuit decided the *Carter* case five days before the Second Circuit's decision in *Ruggiero*, but the panel in *Ruggiero* was apparently not aware of the decision in *Carter*.

[5] The court relied on ambiguous language in *United States* v. *Elliott*, 571 F.2d 880, 902 (5th Cir.), cert. denied, 439 U.S. 953 (1978). The court of appeals read that language narrowly in *United States* v. *Carter*, *supra*.

act did not qualify as the required pattern of racketeering acts and accordingly invalidated the conviction. Thus, the defendant's conviction would have been invalid regardless of the nature of the agreement required to sustain a RICO conspiracy conviction. The Second Circuit's statement of the rule that a defendant must agree to personally commit at least two predicate acts is therefore also dictum.

Ruggiero, like *Winter*, was decided without the benefit of the analysis in *United States* v. *Carter*, *supra*, and the other court of appeals decisions that have adopted what has become the majority rule. Indeed, the *Ruggiero* court stated that it considered its construction of Section 1962(d) to be required by "[p]revailing case law" (726 F.2d at 921). Since 1984, every court that has addressed the issue has adopted the majority rule, which applies to RICO conspiracy the principles of general conspiracy law. In light of that developing trend, the Second Circuit, like the First Circuit, may be prepared to reconsider its dictum in *Ruggiero* when it is presented with a case that requires it to decide whether to adopt that dictum as the law of the circuit.[6]

Finally, it was not improper for the court of appeals to use the jury's response to a special interrogatory on one count to construe the jury's verdict on another count. A conviction that might have been premised on alternative grounds may be upheld if the court of appeals can determine with certainty that the actual ground relied upon by

[6] This Court has repeatedly denied certiorari in cases raising this issue in the last six years. See *Wougamon* v. *United States*, cert. denied, 488 U.S. 960 (1988); *Finestone* v. *United States*, cert. denied, 484 U.S. 948 (1987); *Stewart* v. *United States*, cert. denied, 480 U.S. 919 (1987); *Messino* v. *United States*, cert. denied, 479 U.S. 939 (1986); *Neapolitan* v. *United States*, cert. denied, 479 U.S. 940 (1986); *Adams* v. *United States*, cert. denied, 474 U.S. 971 (1985); *Tillie* v. *United States*, cert. denied, 469 U.S. 845 (1984); *Carter* v. *United States*, cert. denied, 469 U.S. 819 (1984).

the jury was a valid basis for the conviction. See *Street* v. *New York*, 394 U.S. 576, 585-588 (1969); *Stromberg* v. *California*, 283 U.S. 359, 367-370 (1931). The court of appeals therefore correctly relied on the special interrogatory response of the jury respecting the unlawful debt upon which the Count 2 RICO conviction was based as accurately indicating which unlawful debt underlay the jury's Count 3 RICO conspiracy conviction. See, *e.g.*, *Brennan* v. *United States*, 867 F.2d 111, 114-116 (2d Cir.) (guilty verdict on a substantive count may be taken as the equivalent of a special interrogatory indicating that that substantive count was one of the predicate acts on which the conviction on a RICO count was based), cert. denied, 109 S. Ct. 1750 (1989). Contrary to petitioner's contention, nothing in *United States* v. *Powell*, *supra*, requires a different result.

CONCLUSION

The petition for a writ of certiorari should be granted as to the first question presented, the judgment of the court of appeals should be vacated, and the case should be remanded for further consideration in light of *United States* v. *Rios*, No 89-61 (Apr. 30, 1990). In all other respects, the petition should be denied.

Respectfully submitted.

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